
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

CHRISTINA M. HOEFFNER, as
Administratrix of the Estate of
JOHN H. HOEFFNER, De-
ceased,

Appellant,

VS.

NATIONAL STEAMSHIP COM-
PANY,

Appellee.

//

BRIEF FOR APPELLEE.

HETTMAN & HOGE,
315 Montgomery street, San Francisco, California.

JOE CRIDER, JR.,
H. W. Hellman Building, Los Angeles, California,
Proctors for Appellee.

J. HAMPTON HOGE,
Of Counsel.

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BRIEF FOR APPELLEE.

By reference to appellant's brief it will be observed that appellant disagrees with the conclusions of the Court with respect to the evidence in the case.

CONTENTIONS OF APPELLEE.

It is the contention of appellee:

First: That there was absolutely no negligence on the part of the National Steamship Company, either in connection with the happening of the accident or in connection with the attempt to rescue the deceased after the accident.

Second: The act of the deceased in falling from the load of lumber into the water was solely a result of his own carelessness.

Third: That the evidence does not support the allegations of the libel.

From the opinion of Judge Bledsoe, hereinafter set forth in *haec verba*, it will be observed that Judge Bledsoe, after very carefully considering all the evidence in the case, found that there was no evidence legally sufficient to justify the findings of fact and conclusions of the commissioner. The Court reached its opinions from the undisputed testimony and such presumptions as could be drawn from such testimony and did not consider testimony in which there was a substantial conflict.

OPINION OF THE UNITED STATES DISTRICT COURT.

Bledsoe, District Judge:

This case is before the Court upon exceptions to the Commissioner's report. The Commissioner, having heard the case under an order of the Court directing him to take testimony, make findings of fact and recommend appropriate conclusions of law and judgment and decree, has made certain findings and as conclusions of law has recommended that the libelant recover of the respondent the sum of \$14,400.00 compensatory damages, and \$1,000.00 additional as exemplary or punitive damages.

I have given the case very careful and earnest consideration and can arrive at no conclusion satisfactory to me other than that the judgment and recommendation of the Commissioner should not be confirmed by the Court.

The suit was for a recovery for damages sustained by the libelant because of the death of her husband, referred to herein as the deceased, while engaged as a longshoreman in the unloading of the cargo, or a portion thereof, of the schooner "Brunswick". It was alleged in the libel that while deceased was engaged in the performance of his duties and while the ship was proceeding upstream in the harbor at San Pedro, and while the deceased was engaged in making up slings of lumber so as to have them ready when the unloading of the vessel should begin, "the sling yielded a little so that he tripped and fell overboard; that there were no life lines or life rails on the side of said vessel where the deceased was working so that he could be protected; that the said vessel negligently continued on her way after the deceased was precipitated into the water, and she proceeded about five hundred feet upstream before stopping; that no boat was lowered to pick up the deceased and that there were no life buoys thrown and that no efforts were made either by the master or crew of the said vessel to save the deceased, and that as a result thereof the deceased came to his death by drowning."

The Commissioner's findings are not based apparently upon the allegations made in the libel, but proceed upon a different theory, probably a theory developed on the hearing. Seemingly this is not contrary to established principles of admiralty practice. The findings made by the Commissioner are to the effect that after the "Brunswick" cast off from the San Pedro Lumber Company's dock, the first mate, having charge of the unloading of the lumber, ordered deceased to

slung up the lumber, and in obedience to said orders it was necessary for him to go on top of the lumber pile. "The lashings of this lumber pile had previously been removed and the top was a disordered mass of lumber"; that deceased, in company with his working partner, went on top of the lumber pile, deceased being on the outboard side, it being necessary to start slinging from the outboard side, and that "immediately upon getting to his working position, and trying to pull the slings through on the extreme starboard side of the ship, the said John H. Hoeffner stepped on a plank, which tipped, and then stepping on another plank which tipped too and precipitated him overboard and he was drowned"; that there were no life lines, life rails or other protection outboard of this lumber pile, which, while a vessel was under way in a narrow harbor and being subject to pitch or roll from the wash of propellers of other vessels, or to the sudden jar of hitting or being hit by other vessels or obstructions, was a dangerous place to life and limb to those who were required to work thereon; that deceased was precipitated overboard a few minutes after the "Brunswick" got under way, the speed of the vessel at that time being about two or three miles per hour; that the vessel did not immediately stop when the cry of "man overboard" was raised; "that no lifeboat was lowered, no life preserver, life buoy, or piece of lumber was thrown from the 'Brunswick' to said John H. Hoeffner, after he was precipitated overboard and was struggling in the water, and that no efficient efforts were made to rescue him by the master, officers and crew of the said ship 'Brunswick',

and that the lifeboats and other life-saving appliances of the said ship 'Brunswick' were not, at the time that said John H. Hoeffner was precipitated overboard therefrom, reasonably fit and accessible to effect his rescue, and that the master, officers and crew of said ship 'Brunswick' were incompetent and culpably inefficient in the performance of their duties in matters pertaining to the handling of the ship and in the use of the ship's life-saving appliances".

It is further found that deceased had been engaged in working as a longshoreman only a few months; that he had no means of ascertaining the condition of the lumber pile on which he was required to work until he got on top thereof, "when he was immediately precipitated overboard". That he had no means of ascertaining the incompetency of the master and crew of the vessel; that the danger confronting him was a latent and not an obvious danger; that he was not guilty of contributory negligence, but acted in a careful, cautious and prudent manner. It is then further found that the deceased came to his death by drowning in the harbor of San Pedro while in the employ of the respondent on board the "Brunswick", "and that said death was caused by the failure of the respondent to furnish him with a safe and suitable place in which to perform said employment, and by the failure of the respondent to provide and maintain in a reasonably fit and accessible condition, proper and efficient life-saving appliances on board said ship 'Brunswick', and in the failure of the respondent to provide and maintain master, officers and crew competent and efficient in the handling of said ship

'Brunswick' and in the stowage, accessibility and use of life-saving appliances thereof".

It is obvious from a cursory inspection of these findings that some of them are immaterial in that they have no causal relation to the untimely death of the deceased. With respect to others, a careful study of the evidence impels me to the conclusion that they are unfounded and unjustified in so far as the evidence is concerned. For instance, it is not the fact, obviously, that deceased was precipitated overboard and into the water "immediately upon getting to his working position". The evidence of the partner of the deceased and of the winchman who stood on the top of the deckload was to the effect that deceased and his partner had been working in the attempt to get the sling around a sling of lumber for at least several minutes. There is some conflict in the evidence as to whether or not deceased and his partner actually laid the lumber for the sling upon which he was then working, one testifying one way and another another; but, in any event, it is clear that the deceased had been for some considerable time, that is, at least several minutes, on the top of the deckload before he fell therefrom.

The finding that there were no life lines, life rails or other protection outboard of the deckload of lumber, and that in consequence, because of the liability to pitching and rolling from the wash of the propellers of other vessels, or the sudden jar of hitting or being hit by other vessels or obstructions, the place was a dangerous one, is obviously irrelevant and untimely. There is no suggestion anywhere in the rec-

ord that any wash was occasioned by any other vessel, and no suggestion anywhere that anything struck or was struck by the vessel on which the deceased was employed.

Counsel for libelant examined the captain and other members of the crew of the "Brunswick" as to certain matters of seamanship and the like, which were wholly irrelevant to any inquiry pending before the Commissioner. From this examination, counsel himself being an expert seaman, it is sought to deduce the inference that the captain and the members of the crew were inexpert and, as found by the Commissioner, "incompetent and culpably inefficient in the performance of their duties". It would make little difference how inexpert and incompetent the master and members of the crew were with respect to seamanship generally if, at the time of the happening of the accident in question, they acted with due promptitude and without any negligence on their part with respect to the matters and duties *then* devolving upon them. So, irrespective of the wide range of the examination conducted by counsel, the question really is, Did the master and members of the crew fail in any duty *then immediately devolving upon them?*

It is the fact that no life lines or life rails or other protection was placed around the top of the deckload of lumber, but I cannot bring myself to believe that such circumstance is sufficient to charge respondent with liability. Deceased was sent to the top of the lumber pile in broad daylight, a little after 8 o'clock in the morning. There is no suggestion from any source that he could not see perfectly what was up

there, what he was expected to do, and the conditions under which he was called upon to perform the labor involved in the completion of his task. If, going up on the top of the lumber pile in the dark, with no opportunity to see or examine the conditions surrounding him, he had been precipitated overboard, a different question would be presented. I know of no rule of conduct a violation of which would give rise to a charge of negligence which says that where a man is called to a task in broad daylight, of the sort here under consideration, a railing must be built around him to protect him from falling off or overboard. The testimony in the case is that such rails were never put around the tops of deckloads of lumber, and there is nothing so inherently dangerous in the position as to suggest the necessity for a line or rail. At best, the top of the deckload could not have been more than twelve or fifteen feet from the surface of the water; there was no unusual height calculated to disturb one's poise, and it seems clear to me that, conceding the place in which deceased had to work to be at all dangerous, the deceased, in accepting the employment, was called upon to exercise greater care because of the greater risk that was involved. It is not found that if a line or rail or other protection had been under, at, or near the top of the lumber pile, it would have prevented deceased from falling overboard. If one had been built and was reasonably necessary as a matter of duty devolving on the respondent, it would have had to have been lowered as the deckload was lowered in order to be a continuing protection to a worker on the top of the lumber pile. To me the situation is

not at all dissimilar from that afforded by an everyday sight, the repairing of something contained beneath a manhole, at the top of which a man is stationed to assist the man below or to ward off travelers and the like. In a moment of inattention to his surroundings, the man thus employed steps into the manhole and is injured. With as great reason as that urged in the case at bar, it could be urged in such an instance that some rail or protection should have been built around the manhole to protect the man who was watching it from falling into it.

Having full powers of observation, full opportunity to know and appreciate the dangers attendant upon the performance of his duties in the place in which he had to perform them, deceased was under the duty of exercising a care and protection of himself in keeping with the situation in which he found himself. This he did not do, under the evidence, because from undisputed testimony he stepped, *not once, but twice*, upon a plank which was a part of the sling load he was trying to arrange, and the plank being placed slantwise across the block supporting the sling load, it turned or twisted, and the second time he stepped upon it, it turned sufficiently to cause him to lose his balance and he fell into the bay. One of the witnesses testifies that he saw deceased step upon this plank twice; that the first time he did so the witness felt that his procedure was unsafe and insecure; that is, he felt that the deceased was not exercising due and proper care, considering the place in which he was engaged. My own conclusion, therefore, from the evidence, is that deceased was precipitated into the

water not because of any negligence of the respondent or any of its employees, but because of a want of care on the part of deceased himself, *i. e.*, because of his own contributory negligence.

It is next asserted that no life preserver or piece of lumber or anything was thrown down to the deceased when he was in the water. This may be accepted as true in view of the Commissioner's findings, although there was some evidence to the effect that one of the life-buoys on the ship was actually thrown down into the water. There is no testimony in the case as to the direction or speed with which the water in the channel was moving, if at all. Apparently it must have been moving, because the deceased very rapidly either swam, that is, "paddled," or drifted, beyond the stern of the boat. The evidence to my mind establishes the fact that the captain stopped the vessel with all the celerity he could command, in view of the circumstances. The vessel was heavily laden apparently, proceeding under power up the channel when the accident occurred. It is obvious it could not be stopped immediately, and an approaching vessel had to be taken into consideration. Counsel for libelant quotes at some length from the Rules of the Road respecting one vessel overtaking another, etc.; but it should be remembered that these rules apply where the vessels are *proceeding normally*, and that, obviously, the rules could not apply, at least in an unqualified degree, where one vessel, the one being overtaken, is compelled, because of some exigency arising, to change its normal course of procedure and either stop or turn around or the like. Under such

circumstances, obviously, in a narrow channel like that at San Pedro, there was a duty devolving upon the master of the "Brunswick" to exercise care that he should not, in his endeavor to extend succor to the deceased, do that which would bring other lives or other property into danger. It should also be kept in mind that there were upon the water at that time two or three small craft, two of them power boats, and that these small craft, becoming apprised of deceased's fall into the water, were endeavoring to render him assistance. One of them, as a matter of fact, got so close to the deceased before he finally went down, as that those on board the "Brunswick" thought deceased actually touched the craft—a pilot-boat. The person in charge of the pilot-boat threw a life preserver to the deceased and those on the "Brunswick" observed, and there seems to be no controversy with respect to that, that this life preserver landed very close to where the deceased was then being seen in the water. These circumstances—the facts that others who were able to act more quickly than those upon the "Brunswick" because they possessed lighter and quicker moving craft, and that they were using every effort to render aid to the deceased, and were nearer to him than those upon the "Brunswick" were, should be taken into consideration in determining not only the duty devolving upon the men on the "Brunswick," but also in determining the adequacy of their efforts indulged in at the time.

If the deceased had fallen overboard in a large body of water, with no one in the vicinity save those on the "Brunswick," it could easily and very properly

be claimed that a complete failure on their part to do anything in the way of endeavoring to rescue him would be chargeable as gross and indefensible negligence. However, under the conditions obtaining, with others nearer and better qualified to render assistance, the fact that the crew of the "Brunswick" did not do more than they did is satisfactorily explained.

The only finding in my judgment that is at all suggestive of a right to recover on the part of libelant is that in Paragraph Seven of the Commissioner's Report, to the effect that the death of the deceased was due to the "failure of the respondent to provide and maintain, in a reasonably fit and accessible condition, proper and efficient life-saving appliances on board said ship 'Brunswick'." If it could be said, by fair and reasonable inference, that deceased could have been saved if proper and efficient life-saving appliances not on board the "Brunswick," had been there, and had been used with reasonable promptitude and efficiency by the officers and crew thereof, then of course there would be strong reason for supporting the conclusions arrived at by the Commissioner. It should be borne in mind, however, that it was stipulated in the case that the equipment required by law was on board the "Brunswick," and that such equipment was there at the time of the inspection by the United States inspectors, both prior to and subsequent to the accident. There is no suggestion from any source of any change in condition at the time of the accident, and it must be inferred, therefore, that all the equipment required by law was upon the "Brunswick" at the time of the occurrence in question. The

captain testifies that the usual and proper life-boats and life-buoys were on board, and in their proper location. I see nothing in the testimony at all to justify a conclusion to the contrary. The reason why the life-boat was not launched is answered by what has been said hereinabove. The mate and those in attendance upon it thought the others on the bay in the lighter craft would be able to reach the deceased and extend to him the aid of which he was then in need. With respect to the life-preservers, it is a question, as above referred to, whether one was thrown into the water or not. The partner of the deceased, a longshoreman working with him, after deceased's fall into the bay, started to throw a life-preserver to him. Obviously, under all the testimony, though working upon it, due perhaps to his excited state, he did not know how to remove it from its apparently appropriate receptacle. Instead of lifting it up, as he should have done, and merely breaking the twine which held it in place, apparently he was attempting to pull it down through a fixed rack. This occupied some minutes. Before, however, he had succeeded in releasing the buoy, one of the sailors came running up and without difficulty took it from its place. He says he threw it into the water as an aid to the deceased. Whether he did or not is a question, in view of the conflict in the evidence. Assuming that the life-preserver was of the proper and appropriate sort and that it could have been removed with reasonable promptitude, the fact that the partner of the deceased was engaged in attempting to remove it very likely deterred some of the sailors from going to it and

throwing it overboard. Without doubt it was thought that the partner of the deceased would do that which he was evidently trying to do, to-wit, throw out a life-preserver to the deceased. It becoming apparent that he was not succeeding, one of the sailors went to his assistance with the result indicated above. It does not appear, however, anywhere in the evidence, that if reasonable celerity had been employed after the crew became apprised of the fact that deceased had fallen overboard, a life-buoy could have been thrown to him or in his direction which would have had any effect upon his rescue, or would have made it possible for him to avoid drowning. Of course, the proof need not be absolute with respect to this because, in the absence of the actual occurrences, it would be impossible to say absolutely what would have resulted. But there is no testimony from which it might reasonably be inferred that if, exercising reasonable care and promptitude, a life-preserver had been thrown to the deceased, he would or might have been enabled to take advantage of it and save his life.

The deceased having fallen overboard due to his own negligence, no recovery should be had as against the respondent unless at least it should be proven to the degree required by the law that the loss of his life thereafter was due to the neglect, want of care, and culpability of the servants of the respondent. I cannot believe the proof adduced suffices to establish this conclusion, and therefore am constrained to disaffirm the conclusions and recommendations reached by the Commissioner.

The above conclusions seem to be determinative of

the matters involved, considering them in keeping with the theory of the case developed and followed by the Commissioner and the parties upon the hearing. If the rule contended for by respondent, as illustrated in *Burton vs. Greig*, 271 Fed. 271, be accepted, then there is still less ground for a decree in favor of libelant upon the facts as actually adduced.

The exceptions to the Commissioner's report are sustained, and the matter is re-referred to the Commissioner for a new hearing or for such other action as by the parties may be deemed appropriate.

November 13th, 1923.

BENJAMIN F. BLEDSOE,
United States District Judge.

In order to obtain an intelligent version of the manner in which the accident occurred it will be necessary to read all the testimony in the case, as set forth in the Apostles, commencing at page 72 and ending on page 232. We will, however, cite only such portions of the testimony as have a direct bearing on the issues in this case.

EXCERPTS FROM THE TESTIMONY OF WITNESSES.

"The Lumber Was Not in a Disordered Mass."

Testimony of John E. Wahlgren:

A. No, sir. The lashing was still on the lumber at the San Pedro Lumber Company's yard, most of it, I think there was two at the forward end of the

dock that was taken off, right at this dock, San Pedro yard.

Q. As a matter of fact, part of the cargo, the lumber cargo was unlashed?

A. The biggest part of the deckload was lashed on leaving San Pedro Lumber Company yard. (Apostles, pp. 74-75.)

Q. This man was on a sling on top of this lumber?

A. Yes, he was building up a sling, him and his partner.

Q. Did you see him working on this lumber?

A. Yes, I saw him working on that lumber.

Q. Who fixed the sling for him, who arranged his sling load of lumber?

A. Two of them was working there, two men was working putting the sling around.

Q. And he was one of the two?

A. Yes, he was one of the two men. (Apostles, p. 119.)

Testimony of A. Nagel:

A. His partner, the man working with the deceased, he had the sling after they piled his load and put it underneath, and the man, in order to get this load, he had to go on top of this load.

Q. You mean Mr. Hoeffner got on top?

A. Yes, on top here.

Q. And threw the sling there?

A. Yes. The top plank of it was laying in a shape like this. It wasn't exactly straight with the others, consequently when he stepped on it, it tipped.

Q. It tipped?

A. Yes. The first time I noticed it was shaking when he stepped on it the first time. The second time it overbalanced. He had the sling and was trying to take it towards the middle of the load.

Q. He had this string pulling towards the middle of the load?

A. Yes. And it tipped, he overbalanced while holding on to the thing, and him dragging that sling underneath till he came to where the big hook is. (Apostles, p. 151.)

Testimony of Patrick A. Gallagher:

I went forward, and I got a sling, to the poop deck. There was some slings on the poop deck, that is, at the end of the lumber where the winchdriver and a man—I forget whether the mast stands fore or aft—yes, it stands forward, the mast, I am pretty sure. And I unloosened one of these slings and took it down and stuck it under the lumber pile, the load we had already prepared. That is, it was prepared. We didn't prepare the loads. The loads were all prepared. That was laying on the top of the deck. I shoved the sling under and where the splice connects on the string, there was threads on that splice which was hard to get through; so he leans over the load and pulls it with his hand, and he gets it pretty near through. I said, "We will pull the sling back to get it in the center of our load." Well, in doing so, he couldn't get it back. So he stood on top of his load, exactly like that (illustrating), and he reached down to get hold of the sling and give a pull, and the board he was standing on turned, and he slipped

right off back, that is, facing the ship with his back towards the water. At that time the winch-man, he hollered, "Man overboard!" (Apostles, p. 167.)

THE BOAT WAS STOPPED IMMEDIATELY.

Testimony of J. E. Wahlgren:

Q. What did you do when you heard the cry, "Man overboard"?

A. I stopped the boat immediately.

Q. You stopped it?

A. Yes, sir.

Q. That is, you just stopped, rung the engine room alarm to stop the engine?

A. Yes, sir. (Apostles, pp. 80-81.)

Q. Your machinery responded all right, did it, when you gave the orders?

A. Yes, sir.

Q. And all of the appliances were used in stopping the boat that possibly could have been used?

A. Yes, sir. (Apostles, p. 90.)

Testimony of K. Lind:

Q. Did the boat stop immediately then?

A. Yes; he stopped the boat.

Q. In your experience as a sailor, based on this experience that you have testified to that you have had, is it possible to stop a boat immediately—I mean without it moving forward at all, after an order is given?

A. No. If the boat has headway, making headway, if you stop, especially if the vessel is loaded, see, she wouldn't stop right away.

Q. If you slam on everything you have got, it won't stop immediately, will it?

A. No.

I think that is all. (Apostles, p. 125.)

Testimony of Wm. D. Brown:

Q. From your experience as chief engineer of that boat, would you say, with your knowledge of its equipment and its engine, would you say it was stopped and backed as quickly as it could have been?

A. Yes, sir. (Apostles, p. 203.)

THE CREW IMMEDIATELY STARTED TO LAUNCH A LIFE BOAT, BUT BEFORE IT COULD BE LAUNCHED, TWO LAUNCHES, EQUIPPED WITH ENGINES, AND A ROW BOAT REACHED THE SCENE WHERE THE DROWNING MAN SANK.

Testimony of John E. Wahlgren:

A. Before I had a chance to turn the "Brunswick" around or to do anything of the kind to rescue the man there was a boat and two launches at the man already and when I got the head on the "Brunswick," getting ready to get the boat ready to go to the man the man was already drowned. (Apostles, p. 82.)

Q. And you say that they were lowering a life-boat, started to lower—

A. They started to get one ready to lower.

Q. Were there any other buoys thrown from any other boat or vessel to this man other than the one that was thrown from your vessel?

A. The pilot boat coming up the bay, the man in

charge of the pilot boat, he threw a buoy on top of the man.

Q. Where did that buoy that the man from the pilot boat threw, strike, with reference to the man who was in the water?

A. He threw it as near as he could possibly get.

Q. And you say it lit on top of him?

A. Just about, the man was at the time, when he seen it, the man was ready to sink, and he threwed this life ring as close to him as he could.

Q. It struck on top of the man?

A. Almost, as near as I could see. I was watching.

Q. What you are talking about now, this life buoy the pilot man threw that struck on top of him, you saw that with your own eyes, did you?

A. Yes, sir. (Apostles, pp. 89-90.)

Testimony of Gibson:

A. Well, I throwed that life preserver as quick as I got up there.

Q. After that, that was when the vesel stopped, was it?

A. They were getting the boat ready but I didn't go to the boats because I was attending to the life preserver. (Apostles, p. 105.)

A. That was all I know—what happened. I had a life preserver and they were getting the life boats ready to go after this fellow and then there were two launches, one launch and that boat from the dredger. Then we sung out for them to get to this fellow. I was singing out like anything myself to draw attention of those fellows to come to this drowning fel-

low, and this pilot boat, what they call it, I know it was a white painted boat, that was coming up the river and he got close to this man what got drowned and I don't know if he reached him. I didn't see him throw a life preserver but I think the man in the launch reached for the drowning man and he got his hat. (Apostles, p. 105.)

Testimony of K. Lind:

Q. When you saw him go down how many boats were there up around there, the immediate place where he went down?

A. There was three boats.

Q. What size were those boats?

A. Well, there was one skiff there pulled by hand and two gasoline launches. (Apostles, p. 121.)

Q. Did you see any other boat or boats around the point where this man sank? (Apostles, p. 153.)

Testimony of A. Nagel:

A. I did.

Q. How many were there?

A. There was one launch going along the pipe line towards the northern end. I was whistling to them and shouting and they didn't hear me. And there was a pilot launch, a white-painted launch, and a skiff.

Q. Did those launches or boats come up to the place where the man sank?

A. The pilot boat came first. The rest of them came later on.

Q. Did you see any life buoys or lines thrown from any of those boats?

A. One was thrown from the pilot boat.

Q. You heard the cry "Man overboard!" or you gave——

A. I gave it myself.

Q. What happened to your boat immediately after that cry? Did it stop or slacken speed?

A. Yes. (Apostles, pp. 153-154.)

Testimony of Wm. O. Brown:

Q. How long have you followed the sea?

A. 25 years.

Q. Have you seen life boats of the kind that were on the "Brunswick" lowered?

A. Yes, sir.

Q. And you know how they were equipped at that time?

A. Yes, sir.

Q. Equipped as those life boats were, would it be possible to lower one of them instantly?

A. No, sir.

Q. They had been tied up there for some time, hadn't they?

A. Well, we use that boat most every time in the Mendocino Dock at Fort Bragg to get the lines out with.

Q. How long a time would it have taken to have lowered the life boat, that is, to detach it and everything and lower it?

Mr. Monahan: Objected to as incompetent, irrelevant and immaterial.

The Commissioner: Objection overruled.

A. I should say a minute or two minutes, anyway. Maybe three. (Apostles, pp. 201-203.)

Q. By that time the other boats were up there?

A. That depends on where your men is at the time you want to lower them.

Q. Of course, the men have to get up there?

A. Yes, from their work.

Q. In that period of time the other boats had drawn up?

A. Yes. (Apostles, p. 202.)

By the Commissioner: What did they do towards lowering the boat?

A. Took the lines loose that was holding her on the inboard side and where the lines were wrapped around the davits, got them loose and everything ready to hoist her up and throw her over.

Q. But they didn't hoist her up?

A. No, sir.

Q. They didn't throw her out beyond the lines?

A. No, sir.

Q. They didn't raise her up at all?

A. I don't think they did. I wouldn't say as to that, but they didn't move her out if they did.

Q. How many men did you have working on the life boat at the time? Did you have all the men that were necessary to lower it?

Q. By the Commissioner: Then when they saw there were three boats attempting to save the man, then the crew of the "Brunswick" did nothing further—and they stopped?

A. Stopped and waited, yes, sir. (Apostles, pp. 206-207.)

A. These other boats you saw come in rushing up there were manned by——

A. ——Gasoline.

Mr. Monahan: Not all.

Q. Two of them were.

A. Commonly called motor boats or gasoline boats.

Q. And this man had sunk for the last time before they finished their work they had started at lowering the life boats?

A. Yes, sir; just about that time. When the man reached for him it was no use, because the boat was there. (Apostles, p. 208.)

Testimony of John E. Wahlgren:

A. I know they were there to try to get the boat over. I know one man was there and the second mate. I see them. But who else was there at the time I can't state particularly. I know there were some more men there. (Apostles, p. 215.)

Testimony of K. Lind:

Q. You were working at the life boat, were you, there?

A. Yes, sir.

Q. Getting it ready to swing it overboard?

A. Yes, getting it ready, getting the covers off, loosening up the covers.

Q. What did you do to get that ready?

A. I had to clear the halyards, the halyards are generally inside the boat and the cover on the life

boat—see? And then we had to get, there is a fore and aft strong-back to keep the cover in position. And I was working at that and the motor boats started to pull over towards the man so the boat would be there before we got our boat over. (Apostles, pp. 218-219.)

THE BRUNSWICK WAS EQUIPPED WITH LIFE BUOYS AND LIFE BOATS, AND ONE OF THE CREW IMMEDIATELY THREW A LIFE BUOY TO THE DROWNING MAN.

Testimony of John E. Wahlgren:

Q. Did you have any life buoys aboard?

A. Yes, sir.

Q. How were they rigged? What kind of life buoys did you have?

A. Regulation life buoys. (Apostles, pp. 83-84.)

Q. How are they attached? Where were they attached to the side of the vessel?

A. They are stuck in a canvas bracket, stuck right in a position so the man, all he can do is grab hold of the life buoy, pull it and throw it overboard. (Apostles, p. 84.)

Q. Now, Captain, how many of these buoys did your vessel have on it on this date?

A. Life buoys?

Q. Yes.

A. We had four.

Q. Four of them. And how many life boats such as you have described? (Apostles, p. 89.)

Testimony of C. Gibson:

A. Yes. I jumped on the house where the life boats were and four life buoys on the stern of the ship——

Q. On the deckhouse?

A. Yes, right hanging over the stern of the ship——

Q. Hanging over the top rail?

A. In a rack?

Q. Rack?

A. Canvas——Call them “suspenders” same as you put suspenders on. They were stuck in that.

Q. You mean a strap?

A. Strap, yes. And I got up there and one long-shoreman says, “It’s a time to take this life preserver out,” but instead of lifting it out, he was pulling it this way, against the rail, and he couldn’t get it out that way so I just got hold of this life preserver and threw it overboard. (Apostles, p. 101.)

Testimony of K. Lind:

Q. What life boat did you decide upon launching?

A. The port life boat.

Q. Did you have a life boat on the starboard side?

A. Yes, sir. (Apostles, p. 113.)

Q. What kind of life boats did the Brunswick carry?

A. Two wooden life boats.

Q. Can you describe those life boats?

A. Well, they are 20 feet long and about, I don’t know, about 6——

Q. Twenty feet long. Can you give any further description of those life boats?

A. Yes. Four or 5-foot beam on them.

Q. Beyond the dimensions, can you give any further description of them so that if I went down I would know what class of boat to look for?

A. The customary equipment, all equipment with air tanks.

Q. Did you have a compass on the lifeboat?

A. Yes. (Apostles, p. 118.)

Q. I believe you say you saw one of the life preservers on the deck, did you?

A. On the deck when I stepped out, when I came aft.

Q. That life preserver was out of its sling, was it?

A. Yes. (Apostles, pp. 121-122.)

Q. It wasn't in this sling or suspenders?

A. No.

Q. Was it laying on the deck?

A. Yes.

Q. What was its condition with regard to being wet or dry?

A. It was wet. (Apostles, p. 122.)

Testimony of A. Nagel:

Q. Did you see the man in the pilot boat throw the life preserver?

A. Yes. (Apostles, p. 156.)

Testimony of Wm. O. Brown:

Q. Did you see any one throw a life buoy from the Brunswick?

A. Yes. Charlie, a sailor, came by and a man was trying to get one out and Charlie came up and pulled it out and threwed it overboard.

Q. What is that? (Apostles, p. 198.)

Q. How many life buoys were there on the boat?

A. Four astern.

Q. How many life boats?

A. Two. (Apostles, p. 200.)

THE CREW WAS THOROUGHLY EXPERIENCED AND EFFICIENT.

Testimony of John E. Wahlgren:

I am finished with the witness. You can have him. Excuse me a minute. Captain, how long have you been at sea?

A. About 32 years.

Q. And on what class of vessels have you served previous to going on the Brunswick?

A. Different classes of vessels, sailing and steam.

Q. Sailing vessels, too?

A. Yes.

Q. What sailing vessels?

A. Square rigged, fore and aft rigged vessels and steamers of different types and sizes.

Q. How long ago since you served on square-rigged vessels?

A. I came out to San Francisco in a barkentine in 1898, the last square-rigged vessel I been in. (Apostles, p. 86.)

Q. What do you understand about navigation, Captain? Are you a practical navigator?

A. I passed an examination to that effect.

Q. I am glad you told me that. When did you pass this examination for master?

A. About 12 years ago.

Q. For what class of vessel have you got a master's certificate?

A. I got a master's certificate for a steamer on any ocean, an unlimited master's license. (Apostles, p. 89.)

Q. Now, Captain, you have followed the sea continuously for how long did you say?

A. Thirty-two years.

Q. About 32 years. Now, with reference to the sailors that were on the Brunswick at this time, were they experienced sailors, if you know?

A. Yes, sir.

Q. Had you ever found any one of them to be incompetent?

A. No, sir.

Q. They had always performed their duties properly?

A. Yes, sir.

Q. You were familiar with your men, were you?

A. Yes, sir. (Apostles, pp. 93-94.)

Testimony of C. Gibson:

Q. How long have you been going to sea?

A. I have been going to sea since I was 13 years old.

Q. On what classes of vessels have you been going to sea on?

A. Steamers and sailing vessels, square riggers.

Q. Square-rigged vessels?

A. Yes.

Q. How old are you?

A. Forty-two years old.

Q. And you have been going to sea since you were 13 on square-rigged vessels and on steamers?

A. Yes. (Apostles, p. 102.)

Testimony of K. Lind:

Q. How long have you been going to sea?

A. Twenty-five years.

Q. On what class of vessels?

A. Sailing and steam. (Apostles, p. 115.)

Testimony of A. Nagel:

Q. In the capacity of winch man?

A. I have been going to sea since 1902.

A. No. I was A. B. (Apostles, p. 147.)

THE GRAVAMEN OF THE ACTION IN THIS CASE IS THAT THE BRUNSWICK WAS NOT EQUIPPED WITH LIFE BUOYS, LIFE LINES OR LIFE BOATS, AS REQUIRED BY LAW. AS A MATTER OF FACT, AT THE TRIAL OF THE CASE, PROCTOR FOR LIBELANT STIPULATED THAT THE BOAT WAS EQUIPPED WITH RAILS, LINES, LIFE BOATS AND LIFE BUOYS AS REQUIRED BY LAW.

Mr. Crider: As I understand it, Mr. Monahan is willing to stipulate that the United States Inspectors made an inspection of this boat before the accident happened—it has been testified that that was in December, before this accident happened—and at that

time the boat Brunswick was equipped with all necessary appliances, life buoys, life boats, guards, rails, lines, and so forth, as required by law and by the regulations in the Statutes of the United States. I understand you are willing to stipulate to that, Mr. Monahan?

Mr. Monahan: Yes, I am willing to stipulate that at the last time she was inspected by the local inspectors, if she wasn't fully equipped, they would, in the performance of their duties, compel her to be so equipped; and we will assume that she was fully equipped at that time.

Mr. Crider: Then your stipulation means that at that time she was equipped as required by law?

Mr. Monahan: Yes, at the last inspection, whatever time that was. Well, I didn't say life rails. The local inspectors haven't anything to do with those. You can build a ship in any manner that you like.

Mr. Crider: All right, then. Your stipulation covers life buoys, life boats—

Mr. Monahan: And other equipment required by statute.

Mr. Crider: Referring to the time immediately after the accident, a day or so after the accident, an inquiry was held, and that it was so equipped at that time.

Mr. Monahan: No. On mature deliberation, I cannot stipulate to that for this reason; the local inspectors have no authority to do anything beyond or are you speaking about the equipment of the vessel at that time?

Mr. Crider: Yes.

Mr. Monahan: Yes. I will stipulate also the local inspectors found her fully equipped at some kind of an inspection they had after the subject-matter of this libel arose.

The Commissioner: Can you fix a date at which that inspection was made?

Mr. Monahan: Sometime shortly after April 18 last.

Mr. Crider: Within a day or so after, Mr. Monahan?

Mr. Monahan: Yes. That she was fully equipped?

Mr. Crider: Yes, I would also like to offer the findings of the United States local inspectors, that is, the findings giving the result of their investigation of this accident, which I have here.

Mr. Monahan: I object to that on the ground the local inspectors have no judicial authority to inquire into anything beyond the equipment of the ship as provided for by statute, and that, it having been conceded the vessel was fully equipped, the subject-matter of their inquiry is entirely irrelevant and immaterial, and has no bearing on the issues here.

The Commissioner: I will sustain the objection as not being the best evidence. However, it may go into the record for the purpose of preserving the record on review.

Mr. Crider: Your Honor, may I ask that the Reporter copy this, and let the gentleman have it back?

The Commissioner: It may be copied in the record.

Mr. Crider: Mr. Reporter, will you copy this, please?

(The following is the matter so requested to be copied:)

TRIPLICATE.

File No. 981 S. I. G. No.
 Report of Casualties and Violation of Steamboat
 Laws.
 Name of Vessel, Brunswick-Freight steamer.
 Name of Officer, John E. Wahlgren, Master.
 Local District, Los Angeles, Cal.
 Date of Report, May 8, 1922.
 Date of Casualty or Violation, April 18, 1922.
 Nature of Casualty or Violation, Accidental Drown-
 ing.
 Action Taken, Case investigated and dismissed.
 Number of lives lost, One.
 Form 924-A.
 Department of Commerce.
 Steamboat-Inspection Service. 11-45-77

REMARKS.

While vessel was proceeding from dock at San Pedro to dock at East San Pedro about 8:05 a. m., John Hoeffner, an American, 38 years of age, married, who boarded the vessel to work as a longshoreman, accidentally fell overboard while engaged in pulling a sling around a load of lumber being prepared for discharging upon arrival at dock. Vessel was immediately stopped and crew made ready to launch life boat, but was not considered necessary as two launches and a skiff, being in the vicinity, went to his assistance. A life buoy was thrown to him from

one of the launches, which he did not grasp, and being unable to swim, he disappeared before assistance could be given further.

The body was found some eight days later, and coroner's jury brought in a verdict of accidental drowning. Case was investigated on April 20 and May 6, 1922, on which latter date testimony was taken from those connected with the vessel which just arrived in port.

No blame was attached to any of the licensed officers of the vessel for the mishap, and the case was, therefore, dismissed.

(Signed) S. A. KENNEDY, JR.

CARL LEHNERS.

United States Local Inspectors.

(Apostles, pp. 225, 226, 227, 228.)

ARGUMENT.

Only one conclusion can be reached from the evidence in this case and that is that there was absolutely no evidence of negligence whatsoever on the part of the owner of the vessel or its agents.

According to the testimony of certain witnesses the very same pile of lumber that the deceased fell from was piled there by the deceased himself with the assistance of another employee. It will be noted that the deceased had previously been working with another man, who, when the boat left the dock, ceased working with the deceased and proceeded to handle the lines of the boat. The deceased then took on another partner. This partner whom the deceased subsequently worked with stated that they did not pile the

load of lumber off of which the deceased fell. This testimony is satisfactorily explained by the fact that the deceased had been working with another employee and did not commence to work with the witness until after the lumber had been piled. The fact, however, cannot be disputed that the duties of the deceased employee were to assist in the loading and unloading of the vessel. The steamship Brunswick was engaged in unloading certain lumber at certain docks in the channel of the harbor at San Pedro. There was no one on the steamship who would be in a better position to know the condition of the pile of lumber than the deceased himself. Finding difficulty in getting a sling under the load he, either of his own volition or on the suggestion of his partner, who was a fellow-servant, went up on the pile of lumber. The libel alleges that the deceased "tripped". One of the witnesses stated that the piece of lumber on which the deceased was standing with his back to the water was unsteady. A few seconds before the fatal fall into the water the piece of lumber on which the deceased was steadying himself tipped with him. This time, however, he did not fall. The next time the piece tipped or slipped he lost his balance and fell over backwards into the water. It is difficult to conceive how the appellant can seriously contend that there is any negligence whatsoever upon the owners of the vessel in causing the fall of the deceased.

The vessel in this case was used for the transporting of lumber. It is a matter of common knowledge that lumber when being carried on a vessel is always stacked up on the deck even with the edge of the boat at a

height of ten or twelve feet. These stacks are then lashed to the deck of the boat. The statement of Proctor for the Libelant that there should have been a life line or other protection around the top of the pile of lumber to prevent the deceased from falling is absurd. Mr. Monahan as a seafaring man himself knows that such a thing would be highly impracticable and next to impossible. It has never been done in the past and will not be done in the future. It must furthermore be taken into consideration that at the port where the deceased was working the lumber was being unloaded at certain docks. As a matter of fact, the deceased at the time of his death was engaged in preparing a sling load of lumber so that the load could be lifted from the boat to the dock. As Judge Bledsoe mentioned in his opinion, it would be impossible to have any sort of line or guard on top of the load of lumber where the load is constantly changing in height. In this particular case the load became lower as every sling load was removed from the pile of lumber. It was simply one of those unfortunate cases where a man through his own fault loses his balance and falls off of a place where he is working. It is a clear case where the doctrine of assumption of risk would apply.

THE VESSEL, ITS OFFICERS AND CREW, DID EVERYTHING POSSIBLE TO SAVE THE DECEASED FROM DROWNING.

According to the testimony of Gibson, the winchman, as soon as the deceased fell overboard he yelled, "Man overboard!"; he then proceeded to the rear end

of the boat at the same time yelling to the captain and to other persons that a man was overboard. The deceased's partner testified that he attempted to unfasten the life preserver from the stern of the boat but was unsuccessful. He testified that at the time he reached the rear end of the boat and was attempting to unloosen the life line the boat was about three hundred feet from the man who had fallen overboard. The appellant lays great stress on the fact this life preserver could not be released and that no one threw this life preserver to the drowning man. The attempt was made to prove this fact by the testimony of the deceased's partner who himself testified that the man was three hundred feet away from the boat at the time he attempted to unfasten the life preserver from the boat. It stands to reason that it was useless to attempt to throw a life preserver to a man who was this distance from the boat. It is a matter of common knowledge that these life preservers are heavy and bulky. It is impossible to throw them for more than twenty-five or thirty feet. This fact was also laid stress upon by Judge Bledsoe in his opinion. We find, on the other hand, that according to the testimony of the witness Gibson, he (Gibson), when he found that the deceased's partner was unsuccessful in unloosing the life preserver, merely went over to the life preserver, lifted it off of its hook and threw it into the water. The engineer on the boat also testified that he saw this man throw the life preserver into the water. The boat having been in motion at the time the deceased fell overboard, it stands to reason that the life preserver served no useful purpose. The life

preserver, according to the evidence in the case, was hung on a hook. The partner of the deceased in his excitement endeavored to release the life preserver by pulling it straight out rather than lifting it up slightly and then pulling it off of the hook. As we have previously stated, however, the fact that the deceased's partner had difficulty in releasing the life preserver had nothing whatsoever to do with the drowning of Hoeffner.

Appellant lays great stress on the fact that the vessel was not reversed or backed in sufficient time to save the deceased. It must be taken into consideration that the Brunswick was a heavy steamship loaded with lumber. The Brunswick was one hundred and sixty-two feet long and thirty-five feet wide. When the boat was loaded it drew sixteen feet six inches aft and fourteen feet nine inches to fifteen feet forward. Mr. Monahan, the proctor for appellant, as a man experienced in navigation, himself knows that it is physically impossible to immediately reverse a boat of such dimensions with a displacement of approximately five hundred and thirty-two tons. It must be taken into consideration that during the few minutes' time that the witness to the accident was running to other parts of the boat to notify the captain that the man had fallen overboard the vessel was proceeding forward. A certain amount of time was necessarily lost while the captain was signalling the engineer of the boat to stop the engines and reverse the same. After the engineer received the signal it required a second or so for him to stop the engine. It required another second or so for him to reverse the same. During all of this time the boat was traveling away

from the man who had fallen overboard. According to the testimony in this case the boat traveled forward even after the engine had been reversed. Any one who has had any experience whatsoever in navigation knows that it is impossible to reverse the direction of a vessel before it has traveled several hundred feet. The captain of the vessel further testified that there was a boat overtaking him and that to have immediately reversed the engines without changing the direction to the boat would have resulted in the Brunswick in all probability colliding with a certain pipe line and with the overtaking vessel thereby endangering the lives of numerous persons. Counsel for appellant makes a very weak attempt to show that the master of the vessel exercised poor judgment and did not carry out the rules of the road. As Judge Bledsoe stated in his opinion, what might be the rules of the road in the open sea and in ordinary waters would not necessarily be the rules of the road in an emergency such as this. It is well-established law that to adhere closely to the letter of the law in some instances would be to violate the law. It is impossible for rules to be promulgated which will take care of all emergencies. The overtaking vessel was but a few hundred feet from the Brunswick at the time the deceased fell overboard. There can be no denying the fact that the master of the vessel exercised the very best judgment under the circumstances.

Appellant further invokes reference to the fact that the officers and the crew made no offer to lower the life boat. As Judge Bledsoe stated in his opinion, two small gasoline launches and skiff immediately went to the scene of the accident. These boats at the time

notice was given that the deceased was overboard were no further from the drowning man than was the steamship Brunswick. These boats were light craft and were in a position to reach the drowning man as soon as possible. Before it was physically possible to lower the life boat these three craft had reached the point of the drowning man and as a matter of fact arrived just as he sank. To have continued to lower the life boat with all of the other assistance at hand would have been useless. It is a known fact that it takes quite a number of minutes to lower any life boat from a vessel irrespective of what the particular nature of the apparatus may be. The life boat in this case, as in all cases, was nothing more nor less than a boat propelled by oars. Had the boat been lowered into the water it could not have reached the drowning man in any shorter time than it would take to row the boat over to where the man was. To require of the officers of the steamship Brunswick any greater degree of caution and alertness than was exercised in this emergency would be to demand the impossible.

THE VESSEL CONTAINED A COMPETENT CREW.

A feeble attempt was made in the taking of the testimony to prove that the vessel did not contain an experienced crew. This part is also raised in the case on appeal.

We need only to mention the fact that the master of the vessel was duly licensed to act as such; had passed the customary examination given by the duly constituted authorities and had thirty-two years of experience at sea. Mr. Lind, another member of the

crew, had followed this particular line of work for twenty-five years. One of the other witnesses who was a member of the crew testified that he had been a seafaring man for ten years. The fact cannot be seriously questioned that this vessel possessed a crew of men all of whom were experienced in their particular line of work.

THE VESSEL WAS SEAWORTHY AND PROPERLY EQUIPPED.

As far as the seaworthiness of the vessel is concerned, we need only mention the fact as commented upon by Judge Bledsoe in his opinion that both parties at the trial of the case stipulated that the United States Inspectors had inspected the vessel in December prior to the accident and that at that time the vessel was found seaworthy and properly equipped. It was also stipulated to that one or two days after the accident happened the local United States Inspectors found the vessel to be fully equipped. As stated by Mr. Monahan, counsel for appellant, at the time of taking testimony before the United States Commissioner, he was willing to stipulate and stated that he assumed that at the time the local inspectors inspected the boat she was fully equipped. This inspection was made shortly after the accident happened. According to the report of the United States local inspectors (which document was admitted in evidence under the objection of appellant) no blame was attached to any of the licensed officers of the vessel for the mishap, and the case was, therefore, dismissed. As Judge Bledsoe mentioned in his opinion the

question of the equipment of the vessel had nothing whatsoever to do with this accident. Had the boat been equipped with all the life savers and life boats in and about San Pedro harbor it would not have prevented the drowning of Hoeffner. Assistance reached the drowning man before life boats could possibly have been launched and the drowning man having fallen overboard while the boat was in motion life preservers were useless. At any rate the boat was fully equipped and complied with the law in this respect.

Under the facts of this case the only conclusion that can be reached is that the deceased caused his death through his own negligence.

Hoeffner was directly engaged in handling the very same load of lumber that he lost his balance and fell off of. The appellant says he tripped. The evidence shows that he lost his balance and fell off. There is no evidence that the boat was lurching at the time the accident occurred. It is a well-recognized fact that the waters of the channel at San Pedro are smooth and that there is very little activity in that port. Even though the boat had lunched just prior to the deceased losing his balance it would be one of the hazards which he naturally assumed in undertaking said employment.

An employee on and about a vessel must necessarily assume certain hazards incidental to said work. An employee may lose his balance and fall down an open hatch, but this would obviously not be a case of negligence on the part of the vessel, as held in the case of *The Kongosan Maru*, 292 Fed. 801, and numerous other cases. It is merely one of the hazards inci-

dental to the employment which the employee assumes when he accepts such employment.

JUDGE BLEDSOE, BEFORE WHOM THIS CASE WAS PENDING IN THE LOWER COURT, DID HAVE AUTHORITY TO DECLINE TO ACCEPT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES COMMISSIONER.

The Appellant alleges that the district court erred in overruling the findings of the Commissioner. The one case which on first flush would appear to be in point would be the case of *Luckenbach vs. Delaware, L. & W. R. Co.*, 168 Fed. 560. This was a decision of Judge Adams, District Judge of the Second District, decided March 25, 1909.

By reference to the very short opinion in this case you will note that there was absolutely no authority whatever cited for this holding. In the case of *The Boquitlam City*, decided by Judge Neterer of the District Court, W. D. Washington, N. D., May 4, 1919, 243 Fed. 768, the Court said, in commenting upon the case of *Luckenbach vs. Delaware, L. & W. R. Company*, 158 Fed. 560:

“I think the Court should consider the exceptions filed to the report of the Commissioner. The objections to the consideration thereof for the reason that they were not filed within the time provided by Admiralty Rule No. 45, I think, should not obtain. Nor do I think that the Court is bound by the findings and Conclusions of the Commissioner under the order of reference made, as such findings were merely advisory, and the Court may disregard them entirely, for the claimant had entered an appearance and contests the claim asserted. *Luckenbach vs. Delaware, L. &*

W. R. Co. (D. C.) 168 Fed. 560, I do not think is controlling here.”

The last word on this subject is the case of *The Spica-Morse Drydock and Repair Company vs. Susquehana Steamship Company*. (C. C. A.) Second Circuit, March 14, 1923, 289 Fed. 436.

In this case the court said:

“Doubtless, although not specifically so authorized by rule or statute, an admiralty court may send to a commissioner or the like the ascertainment of any special set of facts; but the report is merely advisory, the power of final decision being in the tribunal to which the report is made. (The City of Washington, 92 U. S. 31.) But no party has a right to a reference; the Court is empowered to try each and every part of every case, if so minded, *United etc. Co. vs. Compagnie Generale* (C. C. A.) 271 Fed. 184. And since equity and admiralty derive their respective method from a common source, it is as true in admiralty as in equity that it is not competent for the court to refer the entire decision in a case to a master or commissioner without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment a controversy presented.

“The Commissioner in this case could only have proceeded to try the whole case *by consent*; hence our inference, we being loath to infer illegality. Result is that the decree appealed from rests upon a Commissioner’s report, which, to be sure, allows a certain sum as damages, but is much more concerned in declaring why any damages are allowed, and why appellant should pay them; matters properly for Court’s adjudication before assessment directed.”

Counsel for Appellant has no doubt overlooked the fact that the following procedure, or rather discussion, took place between the Commission and Mr. Monahan on December 3rd, 1922, at the time the matter came before the United States Commissioner for the taking of testimony.

This discussion, which is part of the record and which immediately preceded the examination of witnesses, was as follows:

The Commissioner: "Is the usual stipulation entered into?"

Mr. Monahan: "Yes. We enter into the usual stipulation for Commissioner's fee and stenographer's fee. *And, further, we would like to stipulate that either proctor may save exceptions to any action of the court without specifically mentioning it.*"

The Commissioner: "*I hardly think a stipulation is necessary because the report of the Commission is subject to exceptions.*"

Appellant's Proctor has further neglected to take into consideration the fact that no motion was made to dismiss the exceptions at the time they were filed to the Commissioner's report. In the Luckenback case, which Proctor cites, this was done. As a matter of fact the appellant tried the case de novo before Judge Bledsoe of the United States District Court. Having made no objection whatsoever to the matter being tried before Judge Bledsoe and having filed no motion to dismiss the exceptions to the findings of the Commissioner the Appellant cannot for the first time on appeal raise such an objection. Having tried the

case on the theory that the Commissioner had jurisdiction he cannot now change his theory and contend in the Appellate Court that the District Court did not have the authority to review the findings of fact and conclusions of law of the Commissioner.

Although there is no doubt but what the District Court had the right to decline to accept any of the findings or conclusions of the Commissioner, it must be noted in this case that the court reversed the findings of the Commissioner on the ground that the evidence in the case was insufficient to support the findings of fact and conclusions of law of the Commissioner to whom the matter was referred. As before stated Judge Bledsoe in his opinion does not attempt to weigh the evidence or draw any conclusions of fact from disputed testimony. In arriving at his decision in this case he assumes the truth of whatever testimony there may be unfavorable to the case of the Appellee.

THE QUESTION WHETHER OR NOT DECEASED WAS PROVIDED WITH A SAFE PLACE TO WORK IS NOT A PROPER ISSUE IN THIS CASE.

In the recent case of *Cassil vs. U. S. Emergency Fleet Corp. et al.* (C. C. A.) 9th Circuit, 289 Fed. 774. Decided May 7th, 1923, this court held in a case where a stevedore was injured while engaged in rendering a maritime service in loading a ship that:

“he could hold the Emergency Fleet Corporation responsible for damages only on the theory that the vessel was unseaworthy in respect to the instrument whereby his injuries were occasioned.”

In the case of *Burton vs. Greig*, 271 Fed. 271, the court held that liability could be imposed only upon the failure of the owner of the vessel to maintain the same in a sound and seaworthy condition.

There can be no denying the fact that the steamship "Brunswick" was seaworthy at the time Hoeffner lost his balance and fell therefrom. The boat was properly equipped, according to the stipulation of counsel in the case and the testimony taken before the Commissioner.

Even though this Court might agree with the Commissioner that there was negligence on the part of the officers of the steamship "Brunswick", a recovery could not be had unless the "Brunswick" were proved to be unseaworthy and improperly equipped.

In other words, the owner of the vessel is not liable for a negligent or improper order of the master of the vessel or for the failure of the master to use equipment in a proper manner.

CONCLUSION.

In conclusion appellee reiterates that the evidence in this case conclusively proves that the deceased, John H. Hoeffner, came by his death not by any failure upon the part of the owner of the vessel or its agents to exercise proper or ordinary care, but that the deceased met his death through his own carelessness in stepping on a piece of timber which had previously slipped while he was standing on the same, whereby he lost his balance and fell backwards into the waters of the channel of San Pedro harbor.

Wherefore, we respectfully submit that the judgment and decree of the District Court of the United States for the Southern District of California, Southern Division, be affirmed.

HETTMAN & HOGE,
JOE CRIDER, JR.,
Proctors for Appellee.

J. HAMPTON HOGE,
Of Counsel.